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No. 953

Supreme Court of the United States

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 953

FOLEY LUMBER INDUSTRIES, INC.,

Petitioner,

vs.

THE BUCKEYE CELLULOSE CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

I.

In both Courts below petitioner Foley gave much importance to its right to trial by jury.

In the District Court, it was Foley that demanded trial by jury. (R. 27.) And when, after the jury was sworn, the District Judge excused the jury to resolve "purely legal questions" for the purpose of "a great deal of saving in time for you [the jury] and everyone else" (R. 38), counsel for Foley announced, "We don't consent to the withdrawal of the jury to determine any question that is properly determinable by a jury here." (R. 39.) Of course, when the District Judge persisted in going forward without the jury, counsel for Foley had no choice but to contend that "as a matter of law, your Honor must rule that paragraph 3 of

the contract or agreement of May 4, 1953 does not impose upon Foley any obligation to engage in lumbering operations which will be productive of pulpwood to be offered by Foley to Buckeye." (R. 99-100.) Following entry by the District Judge of his "Declaratory Judgment Order" (R. 155), Foley filed a motion to amend that order to correctly reflect what had transpired (R. 156), together with a motion for a new trial, the first two grounds of which were based upon the substitution of a summary procedure for a jury trial. (R. 158.)

Similarly, upon the appeal to the Court of Appeals, the first two of appellant's statement of points were based upon the error of the District Court in disposing of the case by summary procedure instead of by submitting the issues to the jury. (R. 161.) And the first point argued in Foley's Brief in the United States Court of Appeals was that "The procedure followed by the District Judge wrongfully deprived Foley of its right to a trial by jury."

The procedural error of the District Judge was compounded by the error of the Court of Appeals in attempting to dispose of the appeal by examining the facts and circumstances to determine, as a matter of law, the intent of the parties in using the words of the written agreement. For the District Judge had excluded some of the evidence offered by Foley which was relevant to that consideration if parol evidence was admissible for that purpose. (R. 70-72.) Moreover, upon that question the factual showing made by the record was subject to conflicting inferences.

The Court of Appeals could have rejected the parol evidence upon the theory adopted by Judge Tuttle that the meaning of the written agreement should be determined as a matter of law from the words of the agreement. But when the majority of the Court of Appeals ruled that the

agreement was ambiguous so as to make parol evidence admissible in determining the parties' intent, they should have remanded the case for submission to a jury. The jury, not the Court of Appeals, is the proper tribunal for resolution of the conflicting inferences to be drawn from the undisputed, as well as from the disputed, facts.

II.

The procedural errors are not "academic." They have so confused the issues made by the pleadings and the facts bearing upon those issues that it is almost impossible to tell from the record what issues were tried and determined. It is not surprising that the Court of Appeals erroneously assumed that "Foley ceased to be engaged in any logging and lumbering operation" (R. 194), although that assumed fact was denied by Foley's answer (R. 16) and was neither admitted, tried nor proved. Nor is it surprising that the District Judge erroneously assumed an "utter impossibility of performance of paragraph 3 by Foley" (R. 107) in decreeing that the agreement "is now of no force and effect" (R. 156), although no issue was made as to the "impossibility of performance" and at the time of the entry of that order the contract had eight years yet to run and no evidence was introduced to the effect that Foley could not position itself, during the remaining period, to fully comply with the condition found by the Court (erroneously, we contend) to be essential to entitle it to performance by Buckeye.

Petitioner's insistence upon its right to a determination by a jury of the issues which the jury had been sworn to try is not, as respondent suggests, "a poorly disguised artificial issue contrived solely to avoid this Court's policy of refraining from reviewing matters involving only inter-

pretation of state substantive law." (Respondent's Brief, p. 8.) A gross injustice has been done. This injustice has resulted from the substitution of a summary trial of two issues for the plenary trial by jury of all issues to which Foley was entitled.

The decision of the Court of Appeals approving the summary procedure adopted by the District Judge raises a serious and important question concerning the continued vitality of the constitutional right of trial by jury and has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHESTER BEDELL,
Counsel for Petitioner.

C. HARRIS DITTMAR,
Of Counsel.